UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

THE BROADWAY LEAGUE INC. ,

Plaintiff,

v. 17 CV 9515 (GHW)

BERNARD TELSEY CASTING, INC., ET AL.,

Defendants.

----------x

New York, N.Y.
February 28, 2018
4:02 p.m.

Before:

HON. GREGORY H. WOODS

District Judge

APPEARANCES via Speakerphone

PROSKAUER ROSE LLP
Attorneys for Plaintiff
BY: COLIN R. KASS
DAVID A. MUNKITTRICK

BERGER & MONTAGUE, P.C.
Attorneys for Defendants
BY: MICHAEL C. DELL'ANGELO
SARAH SCHALMAN-BERGEN

(In chambers)

THE COURT: This is Judge Woods. Do I have counsel for plaintiff on the line?

MR. KASS: You do, your Honor. This is Colin Kass and David Munkittrick, along with our legal assistant, Chelsea Tureano, from Proskauer Rose.

THE COURT: Thank you.

Do I have counsel for defendants on the line?

MR. DELL'ANGELO: Yes, your Honor. This is Michael Dell'Angelo, along with my partner, Sarah Schalman-Bergen, from the law firm of Berger & Montague.

THE COURT: Good. Thank you very much.

I scheduled this conference in order to discuss the discovery dispute that the parties have brought to the Court. I've read the letters submitted by the parties. I still would like to give each of you the opportunity to present any additional arguments that you'd like to the Court.

I'd like to divide the issues into two pieces. First, I'd like to discuss the issue related to the requested discovery from Carnahan Casting and Stewart/Whitley Casting; and second, I'd like to discuss the issue with respect to general discovery from all defendants and the timing of its production.

Let's begin with the first topic. Counsel for plaintiff, can I hear from you, please.

MR. KASS: Yes, your Honor. So, discovery in this case began about a month ago. Actually, it began on January 10 when we served our discovery requests. And then it's been now almost a full month since our January 31 status conference where the motion to stay issues were addressed.

During that motion to stay proceedings there were discussions about discovery from each of the defendants including whether there should be discovery based on the sufficiency of the allegations under Twombly. And the Court, I think, allowed us to proceed with discovery and denied the motion to stay.

So, following that we sent letters to the defendants identifying certain information that we thought should be highlighted as part of the initial productions, and one of the issues was documents from Stewart/Whitley Casting and Carnahan Casting based on their allegations that they weren't involved in the cartel. And our belief was that they were, and we've alleged -- we've alleged that they were.

Their response back was that they should be exempt from discovery or subject to some lesser degree of discovery because they don't think the allegations satisfy Twombly.

When we pointed out that they had made a decision in litigating the motion to stay to go for all or nothing and treat all the defendants the same, that once that motion to stay had been denied, that for purposes of the complaint there

is no difference between Carnahan and Stewart/Whitley versus the other casting companies that are out there. They're all alleged to be cartel members.

The response we got back was: Well, under the rule of proportionality they effectively can achieve the same stay because the allegations they believe were too thin to support discovery from these defendants. And I think our point for that was that that's flawed for both, two reasons, one legal and one factual.

Legally our view is that the rule of proportionality does not allow parties that think the allegations in the complaint aren't sufficient to survive Twombly a basis to avoid discovery once the Court has allowed discovery to proceed. And, for example, it would seem hard to believe that the rule of proportionality would say that documents relating to a cartel member's participation in the cartel is not proportional to the needs of the case in a cartel case.

And, likewise, when the allegation or the issues in the case are whether the defendants operate as employees of producers and are somehow subject to antitrust exemption, that documents relating to how they operate and whether they are employees or not is not proportional to the needs of the case.

So our view is that the rule of proportionality does not give the Carnahan Casting and Stewart/Whitley Casting some exemption or lesser role in the case with respect to discovery

versus the other casting companies. That's legally.

Factually, what we know is that both Carnahan Casting and Stewart/Whitley Casting were involved in the alleged cartel. We don't have from the defendants, because they have not yet produced any of their documents other than the union cards, but the Teamsters affiliate, JC 16 or Joint Council 16, has produced some of their documents. And they're not parties to the case, and they're represented by separate counsel, but they did make a production. And it appears that their main role was through their director of communications who was responsible for much of the PR campaign. So we have some of the PR documents, not as many of the underlying cartel documents in terms of the boycott because the JC 16 wasn't involved -- as involved in that aspect of it.

But we do know from that production and from the union cards that both Carnahan Casting and Stewart/Whitley Casting entered into an express agreement to appoint the Teamsters as their negotiation agent, which is one of the things that we are alleging is unlawful under the antitrust law. The actual agreement to appoint the Teamsters as the joint negotiation agent is something that we are challenging.

We also know from the Joint Council 16 production that both Carnahan Casting and Stewart/Whitley Casting were involved in the PR campaign, provided support to that, and that there were industry meetings to discuss the boycott.

Now we don't yet have the full list of people that were at those industry meetings. But we do know that there were industry meetings and that they were -- that as part of those industry meetings it was on behalf of or supposed to be all casting directors were supposed to attend.

So our belief is that even if -- even if it weren't true as a matter of law that the rule of proportionality doesn't give them an exception to discovery, that the facts here are more than sufficient to require discovery from Carnahan Casting and Stewart/Whitley Casting on the same basis as all other casting cartel members, alleged casting cartel members.

And then the last part of our request was that they produce certain documents within two weeks. And those documents that we're requesting are the documents that they say either don't exist or they don't have any document -- many documents, which is their communications with the other defendants relating to these events. If they weren't involved, it shouldn't be a big burden and we believe that they should be able to produce that promptly, especially when you consider that the Joint Council 16 was able to produce within 30 days eleven thousand documents or eleven thousand pages of documents without much problem, and it's now been over 40 days, probably 45 days since we issued our document requests to the defendants and all we have at this point from them are the union cards.

So we believe that it should be possible for them to produce the documents relatively quickly.

THE COURT: Good. Thank you very much, counsel.

Let me hear from counsel for defendants on this issue.

MR. DELL'ANGELO: Thank you, your Honor. This is Michael Dell'Angelo speaking.

Although we don't agree with much of what was just said, I will say that it was productive to the extent that it is really the first discussion that has happened between the parties that substantively gets to proportionality. What I don't think it does is gets over the hump with respect to the requests for discovery that the plaintiff is seeking here.

Now, to be clear, defendants Carnahan and Stewart/Whitley have been cognizant from the outset that on January 31, 2018 at the hearing before your Honor, that your Honor did not stay discovery as to them. So it is not and has not been their position since the denial of the motion to stay discovery that they're not obligated to participate in discovery. They're prepared to and they have made a proposal to produce documents, which I'll address in a moment.

What I do think, what we do believe, your Honor, is that the plaintiff is intent on declaring impasse and deprive the parties of the ability to meaningfully meet and confer about what is proportional and why.

So, some stage setting, if you will. We do not

believe that the same scope of discovery with respect to Carnahan and Stewart/Whitley is appropriate as to the same scope as the other casting director defendants. And a plain reading of the complaint demonstrates why that is so.

So, Carnahan and Stewart/Whitley are mentioned collectively three times in the complaint; in paragraphs 17 and 20 which are the party averments, and then the only other mention is in paragraph 23, in the simple conclusionary sentence that says that the individuals, Benton Whitley and Carnahan, not the companies themselves, were, quote, coconspirators. And there's absolutely nothing else in the complaint that suggests that they participated in the conduct at issue.

And what is particularly important we think, if you look at paragraph 68 of the complaint, your Honor, it expressly excludes these defendants from any participation in the boycott; that is, the complaint acknowledges that neither Carnahan nor Stewart/Whitley participated in the alleged boycott.

That is important because the case is being brought by the Broadway League. The Broadway League has alleged and holds itself out as an organization that consists of over 700 members, including essentially every producer and general manager who runs shows on Broadway. And so if Carnahan or Stewart/Whitley had taken steps in furtherance of the alleged

conspiracy, have tendered the alleged CSA, had demanded a price increase, had demanded health benefits or the alleged 29 percent contribution for health and welfare benefits, or had boycotted the show, surely the league's 700-plus members would have been able to communicate that information to the league. And in particular if you look at the -- some of the exhibits that we've submitted in support of our letter, at Exhibits 26 and 27, there are letters from the plaintiff that identify -- excuse me, 25 and 26, your Honor -- that specify the source of allegations in the complaint, having come from producers or general managers where there are allegations of having tendered a CSA or allegedly having boycotted. Now we have issues with those. But what it does illustrate with respect to these defendants is that not a single league member complained of anything that these people did.

So we do think under Twombly this complaint won't be upheld with respect to these defendants. But, again, we're also mindful that the Court elected not to stay discovery and that these defendants have to participate in discovery. They are prepared to do that.

But, their participation in discovery is also, as we have said over and over again in attempting to try to resolve this issue with the plaintiff, is that the scope of discovery that Carnahan and Stewart/Whitley are subject to is governed by Rule 26(b)(1). 26(b)(1) plainly requires that discovery has to

be relevant to a claim or defense and proportional. And there are a number of proportionality factors which we layout, none of which, in our letter, none of which, I think, favor the plaintiff's request here.

And it is important to put that into context. Because what we did, your Honor, with respect to Carnahan and Stewart/Whitley is offer to produce relevant communications, their relevant communications with other defendants about commercial Broadway productions that concerned the alleged efforts to unionize, the alleged PR campaign, and alleged efforts to negotiate client engagement terms or to obtain health and benefits from producers.

So what we did was we expressly offered to produce communications from these defendants to get to the heart of the case. The League and none of its 700-plus members can identify a single thing that they allegedly did. Notwithstanding that, because they have to participate in discovery, we said what is proportional is a production of their documents that goes to the heart of the complaint. And if those documents show that more is wanted we have a discussion about producing more. But that was not sufficient. We believe that what we have proposed is proportional under 26(b)(1) for a number of issues.

The first factor is: What are the issues at stake? Well the issues at stake with respect to Carnahan and Stewart/Whitley are questionable at best because they haven't

actually been alleged to do anything or they actually directed any unlawful conduct when you look at how bare the complaint is. The second factor is the amount in controversy. There is no amount in controversy with the exception of the plaintiff's request for its own legal fees. What they're seeking here is an injunction, and I do not think that that favors -- the amount in controversy factor favors broad, expansive and expensive discovery. The third factor is whether or not the plaintiff has access to the information that it needs. And, as I've explained, it has a tremendous access to information from its own 700-plus members which shows nothing. We've also offered to produce the relevant communications that I have outlined. And importantly it has received, as you've heard, your Honor, information from the Joint Council and the Teamsters. And let me -- the international Teamsters -- as well as the union cards. And let me pause there for a minute to say that I do not think that the union cards or, as they put in their letter participation in a social media campaign, constitutes participation in a conspiracy. Signing a union card is signing a union card. We have a difference of opinion on that. But, again, the scope of communications that we've agreed to provide will provide the answer and if more discovery is warranted more discovery can be had.

But if merely participating, for example, in a social media campaign were enough, the Court will soon find that there

are a number of people who participated in a social media campaign, not the least of which are people like Robert De Niro and Bette Midler, and I don't think anybody is suggesting that they were coconspirators or should be subject to the kind of broad and expansive discovery that's at play here.

Fourth, there is the relative resources of the parties. It's it is clear from how this case is being litigated and the fact that the League chose to bring this case as it did, rather than seek some immediate relief, that it is committed to spending millions of dollars to litigate this case. Whereas, Stewart/Whitley and Carnahan are relatively limited in resources, and broad and expansive discovery of the type that they're seeking, these 110 requests as to each defendant, would be incredibly burdensome and incredibly expensive.

By way of example, just one of the custodians that we've collected from these defendants has over a terabyte of data. Just the cost of collecting, processing, storing that data is incredibly expensive. Then reviewing it with the scope that the plaintiff wants simply magnifies the cost for little to no incremental value when they're getting the types of documents that we've offered that would get to the heart of the case.

And the next factor is -- and I just would add the type of discovery that they're seeking includes, for example,

five years of tax returns. I don't think that five years of tax returns from defendants about whom nothing has been -- nothing has been alleged is warranted under the circumstances when they would get what they want. And when you consider the cost issue, what we did say to the League is that if it wants more than we're offering, which we think is what is necessary for them to prove their claim, if there's anything to prove based on this discovery and is proportional under Rule 26(b)(1), we will entertain it if they are willing to pay for it and they were unwilling to do that.

Finally is whether or not the burden and expense outweighs the benefits. And I think it's, as I articulated, it does not here because the League would be getting what it needs and if it needs more it can get it.

I'd just lastly, I think this point will come up a few times so I'd like to emphasize it. The limited production of eleven thousand or so documents from the Joint Council and the Teamsters International is not really a proxy for the productions here. We've looked at those productions carefully. There is a tremendous amount of duplication. They were clearly collected and produced in haste in a way that they don't comport with the complicated and sometimes onerous requirements of ESI stipulation that the parties are in the midst of working out here. They are formatted in such a way that some e-mails go on for pages, and pages, and pages which magnify the page

count in a way that make that number not particularly misleading. And they were not responding to 110 document requests the way these defendants would be. So I just don't think that it is a meaningful proxy for what these defendants are being asked to do.

But all that said, your Honor, I think that Carnahan and Stewart/Whitley are quite well aware that they're subject to discovery. They're willing to participate in it. They've made a reasonable proposal for the production of documents to get the plaintiff what it needs at this stage, are open to providing more if necessary, and their proposal is imminently proportional under 26(b)(1).

THE COURT: Thank you.

Counsel for plaintiff, what's your view? First, do you believe that there are grounds for the parties to work together to develop a more narrow set of requests for this set of defendants, mindful of the proportionality requirements which have been in the rules and which have been relocated in the 2015 amendments to underscore their significance?

Is there any ground do you think for the parties to discuss a more limited set of requests from these defendants on the basis of proportionality?

MR. KASS: So let me address that and let me step back for one second.

Our view here is that Carnahan Casting and

Stewart/Whitley Casting are full-fledged members of the cartel and the JC 16 production and the union cards establish that.

That said, what we are looking for is to treat them the same as the other casting companies. So, yes, we had relatively comprehensive discovery requests which have been objected to on a number of grounds. We're not asking for Stewart/Whitley or Carnahan Casting to do anything more than the other casting companies have done. But our view is that they are actual members of the cartel.

Now, when you think about their offer of production which came sort of at the very end of the lengthy number of correspondence and meet and confers that we've had on these issues, there are two issues with that. Number one, what is excluded from their offer is anything that has to do with how these companies operate, which goes to the heart of whether the exemption applies to them.

And as the Court may recall, the defendants admitted at the January 31 status conference that they have to, quote, run the table across all of the defendants in order for the exemptions to apply. And because Carnahan Casting and Stewart/Whitley Casting had signed the union cards and have expressly appointed the Teamsters as their collective negotiation agent, in order for that exemption to apply, they have to establish that they are, in fact, employees of producers and they are not companies themselves.

So discovery requests going to how they operate, which is entirely excluded from their offer of production, is certainly relevant and proportional to the case.

THE COURT: Good. Thank you. Thank you, counsel. That's good.

So thank you very much for your arguments here. Thank you for the letter and the arguments presented there.

I'd like to just make a few comments. I think that all of or I hope that all other counsel on the phone are aware of this. As you know, the 2015 amendments to the rules relocated the proportionality requirements in order to underscore the significance of that requirement, one that existed in the rules previously but that through its movement has drawn attention to it in a way that was not previously the case.

It should be clear, however, that the proportionality requirements don't allow the responding party to unilaterally make decisions about what discovery it will produce based on its assessment of proportionality alone. That requirement is designed to trigger a conversation between the parties and to drive resolution of potential issues by the court. But it doesn't allow a party to make its own independent assessment of what it is willing to provide based on its unilateral view of what is proportional to the needs of the case. Proportionality is not measured by the number of times that a party is

mentioned in a complaint, nor is it measured by defense counsel's view regarding their client's respective degree of culpability. If it was, few cases would be fully litigated because presumably defense counsel assume that their clients are not liable or that they take at least a positive view of the likely liability of their client. So the proportionality requirement does not, in my view, permit a party to independently and unilaterally determine what is proportional to the needs of the case.

The language of the defendants' objections state that, "Subject to plaintiff demonstrating that the requested discovery is proportional to the needs of the case with respect to these defendants" they will conduct "a reasonable" custodian search for "documents that are proportional to the needs of the case."

I want to remind you, parties, too that the rules provide for attorney certification of discovery responses. Those certification requirements are not that you gave over all the documents that you thought were proportional or reasonable. The requirement is that you certify that with respect to a disclosure it is complete and correct as of the time it is made. So, these caveats about giving those things that you think are reasonable and that you think are proportional to the needs of the case I think are not aligned with the requirements of the rules. The proportionality requirement is designed to

prompt a conversation but, as I say, does not permit a party to unilaterally determine what is proportional and what is not. The certification requirements that counsel attest that the response is complete and correct should make that point clear, as should the fact that the 2015 amendments did not change this requirement, they simply refocused it.

So to the extent that the objection to these discovery requests is based on defendant's assessment that this point, these individual defendants are less culpable, or less liable and therefore that less discovery is warranted as to them, I don't believe that that's a sufficient basis to withhold responsive discovery. That does not mean that I discourage the parties from having substantive conversations about the proportionality of your requests and custodians to be searched and search terms to be used. All of those are appropriate, in fact, probably necessary given the extent of discovery here. But the constraints on the scope of discovery should be agreed upon by the parties or constrained by the court. A party cannot arrogate unto themselves the decision about what is in their view proportionate or reasonable.

So, to the extent that the request here is that I direct that defendants Carnahan Casting and Stewart/Whitley be required to comply in the same manner as other defendants to these discovery requests, I am doing so. The basis presented for treating them differently, namely counsel's perspective

that they are less culpable or mentioned fewer times in the complaint in my view does not provide a justifiable basis to treat them differently.

Again, if counsel can work together to resolve on a different approach you're welcome to do so. But from my perspective I'm unwilling to differentiate them from the other defendants based on one set of counsel's views given that the other set of counsel has a different set of views and that this issue, namely decisions about proportionality, are not a valid forum for litigation on the merits of the case.

So, to the extent that the request here is that I instruct that Carnahan Casting and Stewart/Whitley be required to respond to discovery in the same manner as other defendants absent an agreement between counsel for the parties, I am granting that request, and will turn to the second issue.

Counsel for plaintiff.

MR. KASS: Thank you, your Honor.

The second issue goes to the timing of initial productions of nonobjectionable documents. As the Court may recall, we set a relatively aggressive schedule for discovery of 210 days. And our belief is that in order to meet those deadlines, conduct all of the depositions that need to take place, we need to start getting our documents or exchanging documents among the parties.

The issue that arose was right after the January 31

status conference we sent a letter to the defendants saying we understand that you have -- you know, you have our requests. We understand that you're working on the objections. There are certain documents that we believe should be promptly produced which is basically the documents concerning the communications with the defendant -- among the defendants and more generally documents from their active e-mails, understanding that certain other things can take longer like hard copy documents and network drives and other things, but collecting and producing from e-mails, active e-mails should not be all that difficult or time consuming.

The response we got back was that, well, you've asked for many different types of documents, some of which we have objections to. We need to decide all the custodians that might be at issue in the case in order to warrant collecting from any of them, in order to warrant producing, and we need to reach agreement on the full scope of discovery before we even begin the rolling production.

The concern that we have with that is that when we served our document requests back in early January and we invited the defendants to meet and confer with us over any issues that they had, they declined and waited until the end of their 30-day period to serve their objections, which is their right. But then when we got the objections it was basically every conceivable objection that you could imagine. It was in

total 320 pages of objections. Now, there's some overlap because they served it in three sets, depending on -- our four sets, depending on the different kinds of defendants. But between 70 and a hundred pages of objections per defendant.

And so three business days later we served a 24-page letter identifying the deficiencies. And we have now since sent them another letter on the issue of custodians. But, it's now been two weeks since we sent that letter, the 24-page letter, without a response. And so if we have to wait until the very end of the meet and confer process, across all of their objections, to get even the documents that they don't currently object to from the custodians they've already agreed to produce, we are going to be at the end of our 210-day period without even having the documents to conduct the depositions and so we are concerned.

Our personal view is that, as the documents we've identified, the nonobjectionable documents from the active e-mails of the custodians they've already agreed to produce, those should be produced promptly.

The JC 16, again, they were able to produce all of the documents within 30 days of getting our document requests. It's now been close to 45 days since the defendants got our document requests. And at least as to that universe of documents, they should be able to produce it.

Now the JC 16 production we served -- it wasn't quite

identical to the documents requests that we served on the Teamsters, on the Local 817, but it was pretty close. And they were able to produce.

And were there some issues with regard to their production format? For some of the documents, yes. But many of their documents they produced in perfectly capable -- you know, perfectly legitimate, easy to use, format, including native files, images. It was -- there is no reason why the defendants could not produce the same kinds of documents in the same timeframe, which is really going to be necessary if we are able to meet the discovery deadlines in this case.

And the last thing I'll note on that is the defendants in their document requests said that they'll begin the rolling production after 60 days but won't complete their production for 150 days. That leaves hardly any time to conduct the numerous depositions that the parties will have to conduct if they use even most of that time.

So, again, our request is that the defendants produce the nonobjectionable documents as soon as they are able without awaiting full resolution of all the issues that they have raised in their objections, which we're perfectly willing to work through on basically any schedule that they want. But we don't want to hold up the documents that are nonobjectionable. And then as to the active e-mails, we request that they produce those within two weeks because we think that they could do that

just as the JC 16 has done it relatively promptly.

THE COURT: Thank you.

Can I hear from counsel for defendants, please.

MR. DELL'ANGELO: Yes, your Honor. This is Michael Dell'Angelo again speaking.

First and foremost, I do not think that the plaintiff's concerns are well founded, nor do I think that they will play out here.

I'd like to do some stage setting for you, your Honor, so you understand where we are in the litigation and the considerable efforts that we have undertaken both with respect to discovery and what else is going on in the litigation.

As the Court I'm sure is aware, all defendants have motions to dismiss due this Friday, March 2, which is a considerable undertaking on our behalf.

A mediation has been scheduled and is on the docket for March 19, which requires considerable preparation as well, and we're required to submit mediation statements on March 12.

Meanwhile, we have been responding, evaluating and responding to nearly a thousand document requests.

THE COURT: I'm sorry, counsel. I'm sorry, counsel. Counsel, counsel can I pause you.

On the timing for the motion to dismiss and the mediation date, are you seeking relief with respect to the briefing schedule for the motions to dismiss in light of the

anticipated mediation session?

MR. DELL'ANGELO: It would certainly aid our efforts to focus on the mediation and to focus on the discovery efforts.

One of the problems that we've had, and we've tried to communicate, is there are so many things going on at the same time it requires some allocation of -- we have to decide how to allocate our resources somehow. And if the Court is amenable to that, that would be extremely beneficial to our ability to focus on and facilitate and get out discovery even faster.

THE COURT: Thank you. I am amenable to it.

Let's get to the end of this conference and then we'll talk about it. I am mindful of the energies in particular that the parties will be putting into the scheduled mediation session and if I could help you focus on those efforts by delaying the deadline for the motions to dismiss I'd be happy to hear the parties' position on it.

But let's focus on the discovery issues at this time.

MR. DELL'ANGELO: Thank you, your Honor. And I sincerely appreciate that.

So what we have been doing is collecting from not only the custodians we've identified in our responses and objections but additional custodians that we believe -- that either the plaintiff has asked for or we think are likely to have documents that we've learned more about as we've gone through

this process. And just by way of backdrop, your Honor, simply going through a thousand document requests and coordinating with custodians across nine defendants involves a very substantial learning curve in trying to figure out which custodians have documents, where they are, who has documents that are responsible for what, what exists, what doesn't.

So we have been extending a tremendous amount of effort to identify custodians, identify sources of hard copy and other ESI documents, collect those. And just to give you some perspective, your Honor, some essential files or custodians, ESI is so large that it has taken three to four days of computer processing time simply to extract it to begin the process of getting it on the database.

Meanwhile we have been receiving and trying to respond to a flood of discovery letters. Mr. Kass is absolutely correct. We have not yet responded to his 24, 25-page letter about the various objections in several of the document requests. We have gone through that letter very carefully. We've prepared a response. To be perfectly frank and transparent with the Court, it was my hope to get that out yesterday but preparing for this and working on the motions to dismiss has taken some attention away from getting that letter out.

But what I will say is I think that there is already, if one looks at the document requests, considerable agreement

about what all of the defendants are willing to do, and our response to the plaintiff's letter moves that forward even more substantially. The areas that there's agreement are actually fairly narrow.

Just the other day we received another 11-page, single-spaced letter about custodians. Meanwhile, we've had a number of one to nearly two-hour telephonic meet and confers where we've marched through custodian by custodian, and we've tried to be very transparent, giving information about what they do and how they fit in, to the extent that we know it and discovered it and why they are or are not appropriate custodians.

What I will also say is, your Honor, is the motion that was filed and you have before you came twelve days after responses and objections were due.

I think that there was an awful lot that the parties could have and should have been doing to resolve these disputes and move discovery ahead instead of focusing on briefing the motion and all the other -- motion to compel and all the other things that we've been doing.

But our objective is clear and we have been working very hard toward balancing the speed of a production, being efficient, and avoiding duplication. Every project that emerges and every ten-plus, single-spaced page letter that we get and need to respond to, are then castigated for not

responding to as quickly as the plaintiffs would like in light of all the other things that we do just tends to slow down the things that we're trying to do to get them documents. So I think in a number of ways the parties are talking past each other on the process.

But what is important to understand is what the process has yielded. It has yielded terabytes of data. If the Court takes a look at the Kellner declaration, which we submitted as part of -- in support of our letter here and was part of the motion to stay, there are practical realities to what it takes to extract even active e-mails, the e-mails that counsel wants within two weeks. It takes a long time. We're not in the old days of going back to -- and I'm just old enough to have dealt with this -- where you could go to a file cabinet and pull out documents and have some boxes in a conference room and get them out quickly. Just identifying, downloading, scheduling with custodians who are traveling all the time -- we have one custodian whose father is terminally ill and is perpetually out of the country dealing with his father -- trying to schedule around all these people and make collections and tie up their phones and personal computers literally for days to do some of this processing takes a tremendous amount of logistical work and is also very disruptive into their businesses. That said, we have been pushing that process hard and have gotten almost everything that we need and have agreed

to produce from and I think in many instances more.

But what it will yield is millions of documents. And so what we recognized early on is that this process is going to take some time. We talked about that with the Court on January 31 at the hearing and I think, as we put in our letter, the Court was mindful of the fact that it was a tremendous amount of discovery that was being asked of the defendants here and it was going to take some time to process.

So rather than overpromise and underdeliver what we suggested is, as we are permitted to do under Rule 34, we set out a reasonable timeframe for the completion of discovery, which is 150 days. Given the enormous volumes of discovery and what it will take to search for it and review it, I don't think that that is unreasonable. And to be clear, that is a substantial completion deadline. It is not a document dump of millions of documents, 150 days from now. The plaintiff will be receiving documents on a rolling basis. We were explicit about that fact. They asked to have union cards on February 9. We prioritized and got that for them. We were getting document responses and objections out to a thousand document requests. We managed to push the button on the production of those a few minutes after midnight as we were rushing to get everything out and were castigated for that as well.

That said, though, we are trying to prioritize and move these things out. But, the notion that one can go

through, quote, active e-mails in just a few weeks, fully review them, to pull out anything that's not objectionable to a thousand document requests, review them for privilege, review them for responsiveness, do all the processing that's required and get them out is simply not realistic. It sets up an impossible construct. And we are trying as hard as we can and devoting tremendous resources to moving this as quickly as we can, mindful of the fact that the Court did not stay discovery while the parties are seeking to mediate and while the defendants are working on a motion to dismiss.

So all we ask the Court is that it recognize the considerable efforts that we have undertaken and that we are sincere about the hard work and attention that we've put into the discovery process, and that we are doing what we can to collect, review, and produce these documents in a manner as quickly as we can, well within the timeframe that we've set out which provides substantial time to conduct additional discovery and depositions within the 210-day discovery period that the Court has set out.

We're committed to doing that. We're going to continue to do it. But we do need some cooperation from the plaintiff in actually engaging in a substantive meet and confer which we, quite frankly, have not had. And we expect that that will change now that we've had the opportunity to talk to the Court. We look forward to that so that we can get these issues

done and also we look to the indulgence of the Court to leave us to do our work in a good faith manner and get it to the plaintiffs as soon as we can.

THE COURT: Good. Thank you very much.

Can you give me a sense, counsel, how much time you think you need to begin delivering the suite of responsive documents that are, I'll call it, uncontested?

MR. DELL'ANGELO: So I have given considerable thought to that question, your Honor. It is difficult to give you a precise answer and it's always dangerous to make estimates. But what I can tell you is it has taken, with respect to some of these custodians, literally three to four days to download some of the data -- as I indicated I think earlier at least one of the custodians has more than a terabyte of data -- which then needs to be processed according to the ESI stipulation and processed so it can literally be extracted and put onto a new platform. It's not like one can just copy an Outlook box and start running searches on it in a way that's efficient. So, frankly, it will take I think at least two to three weeks to fully get the documents on the platform.

What we can do in the meantime is run searches and identify responsive documents that are within the scope of those that we have agreed to produce without some general or specific objection or some scope or proportionality issue and start producing those shortly thereafter.

I will tell you from experience that that processing, once you've identified the documents, they need to go through a second privilege review and then they require some electronic processing which, depending on the volume, can take a few days.

Now what we can do and one of the things that we tried to highlight in the request is that we can make certain types of documents available for inspection, and we've been having a parallel conversation with the clients to see if there's certain categories of, for example, hard copy documents that we could make available for inspection more quickly to satisfy the demands of the plaintiff to get this done as quickly as possible.

But realistically to start making large scale productions, I think realistically it's going to take at least a month. But that doesn't mean that smaller swaps of documents can't be produced in the meantime if we can identify and prioritize them with all the other things that we're working on.

THE COURT: Thank you. Good. Understood. I appreciate that.

Counsel for plaintiff, any response?

MR. KASS: Yes, your Honor.

So I think the issue here is that if -- if this were a class action antitrust case that wasn't focused on curing ongoing conduct through injunctive relief on an expedited

basis, the process that the defendants outline of making sure that we have all of the parameters of the discovery taken care of and we do things sort of on a relatively leisurely basis of getting documents into the system takes a few days doing multiple levels of review, and then ultimately producing things once everything is done, that's how a lot of antitrust cases are done where it's not sort of an expedited schedule.

But there are many antitrust cases where discovery is expedited, and generally you do that in all sorts of preliminary injunction proceedings, and I know this is not a preliminary injunction proceeding. But we are under a relatively expedited schedule. And so that requires that you do some things to try to get the documents, at least the critical documents to the other side as soon as you possibly can. And the ones that are the easiest documents to do are the active -- you know, documents from the active e-mails that are not objectionable. And just as the JC 16 was able to download from their custodians the relevant documents, do some search terms to get the relevant documents available and produce them in a relatively short order, there is no reason why the defendants couldn't do it.

Now, what the defendants did was they waited until our first meet and confer before they even started collecting their documents. So we served our document requests back in January, early January. We invited them to continue to meet and confer.

We sent them letters about trying to get initial productions with their objections and responses, so after the first 30 days. And then, when the meet and confer was scheduled, after they served their objections, they tell us that they hadn't even started the collection process. And then they tell us that, well, not only have they not started the collection process but they won't even start their rolling production until they have all of the parameters of the full scope of discovery worked out, including all of the custodians, all of the search terms, which they have not shared with us yet, and all of the other objections that they have, totaling 320 pages. And our position is that that's not a reasonable way of proceeding when you only have 210 days of a discovery period.

THE COURT: Thank you. Understood.

I appreciate that there's a significant volume of discovery in this case. I appreciate that defendants are working, as I understand it, diligently in order to respond to these requests. I believe that the request presented to me here is that I compel the defendants to produce readily available nonobjectionable documents without awaiting resolution of objections to other documents and to produce within two weeks all nonobjectionable documents from the active e-mails of custodians that defendants already agreed to search.

I understand, and please correct me if I'm wrong, counsel for defendant, that you are willing to begin to produce

nonobjectionable documents without awaiting resolution of objections to all other document requests.

Is that right?

MR. DELL'ANGELO: That is right, your Honor. And we're willing to do it in a reasonable timeframe.

THE COURT: Good. Thank you.

MR. DELL'ANGELO: Our position from the outset --

THE COURT: Good. Thank you. Understood.

So the second part of the request is that I direct defendants to produce within two weeks that suite of documents from active e-mails of custodians that defendants have already agreed to search.

I've reviewed the affidavit of the ESI provider and I've heard the comments by counsel for defendant here. Having done both of those things, I don't believe that it would be reasonable for me to direct the defendants to produce within two weeks that category of information. I simply believe it will take longer for them to do that work in a professional and responsible way.

I heard counsel for defendants say that he anticipates that they can begin doing that rolling production within approximately a month. I believe that that is a reasonable proposal. I'm not ordering that you do so within a month because I understand that you are caveating that response. But my expectation is that you'll begin to produce documents on

that timeframe. And to the extent that a meaningful production does not begin on that timeframe, I expect plaintiffs to raise the issue with the Court.

Going forward I do hope that the parties will work together collaboratively on resolution of these issues. I think a lot of the issues can be resolved through discussion.

You'll see I just put onto the docket a reference to Judge Parker, this case for general pretrial just in the event that there are additional disputes that need resolution, I thought that she may be well equipped to be able to assist you. That said, I hope that you won't really need her help and that rather you'll be able to work through any of these issues on your own.

So, counsel for defendant, can you do your best to begin your production no later than a month from now. Again, I'm not ordering it but I just want to make sure we have a common understanding of the timeframe in which you hope to do so.

MR. DELL'ANGELO: Yes, your Honor. We already are and will continue to do so and I appreciate the perspective that you have added and we will act accordingly.

THE COURT: Thank you.

So now let's talk about the motion to -- motions to dismiss. I am open to postponing the briefing schedules for those. I don't remember being aware that the mediation was

scheduled so close on the heel of the deadlines. It may not have been set at the time of our last conference. But I think that that's a meaningful factor in figuring out how the parties should be focusing their resources in the near term.

Counsel for defendants, would you like to request additional time for submission of those motions and if so when would you propose that they be due?

MR. DELL'ANGELO: Thank you, your Honor. This is Michael Dell'Angelo.

Yes. We would like to make that request. And just to give you, just to orient us a little bit, the Court ordered the parties to court-supervised mediation had set the schedule for the motions to dismiss but the mediation had not yet been scheduled and it was only subsequently, so you would not have known at that time that the mediation was -- what the schedule for mediation was. It has since been set by agreement of all parties and the mediator on March 19.

As a result, I think from our perspective moving the briefing schedule out 30 days would give us ample time to focus on actually preparing for the mediation and all of the things that go with that. It would also allow us to focus our efforts more heavily on the discovery case which I think is what the Court and the plaintiff is more interested in seeing here in any event. And with the mediation scheduled on the 19th of March, certainly the parties could provide an update to the

Court about or may receive one from the court-appointed mediator to give further perspective about what, if anything, is necessary for the briefing at that point.

THE COURT: Good. Thank you.

Counsel for plaintiff, what's your view?

MR. KASS: We don't have an objection if the Court and the parties would like additional time on the motion to dismiss.

THE COURT: Thank you.

I'll adjourn the deadline for the motion to dismiss to a month following the current date. That should take us to around April 2, if that's a weekday. I will issue an order to that effect after we end this conference.

I'll adjourn the deadlines for oppositions and replies, maintaining the proportionate amount of time between each of those dates and the originally scheduled motion date.

Good. Anything else for us to discuss here, counsel for plaintiff?

MR. KASS: Just one thing, your Honor. Just in the interest of full disclosure, we understand that the Court has assigned Judge Parker as the magistrate judge. Just so that everybody knows, she is a former partner of Proskauer. We don't have any objection to her continued role in the case but I wanted everybody to be aware of that and thought it would be better to just raise it so everybody knows.

THE COURT: Thank you. I'll let Judge Parker make a decision about whether or not she believes that she must recuse herself. I take no position on that. I think that the way that it works is that if she were to choose to do so it would be randomly reassigned to another magistrate judge. That's a decision that I leave to her. To the extent that there are concerns that either party would like to raise regarding it please feel free to raise them directly with her. I'm sure that she will note the fact that Proskauer is involved here and take appropriate action.

MR. KASS: Thank you, your Honor.

THE COURT: Good. Thank you all.

(Adjourned)